

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A \$30,000 civil)
penalty assessed by the Department)
of Ecology against Cascade Pole)
Company regarding its Olympia)
facility,)

PCHB No. 87-65

CASCADE POLE COMPANY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF)
ECOLOGY,)

Respondent.)

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER is the appeal of civil penalties totaling \$30,000
assessed by respondent against appellant for alleged violation of
Chapter 90.48 RCW and Chapter 70.105 RCW.

The matter came before the Pollution Control Hearings Board, Wick
Dufford, Chairman, Lawrence J. Faulk, Member, and Judith A. Bendor,
Member.

William A. Harrison, Administrative Appeals Judge, presided.

1 The hearing was conducted at Lacey, Washington, on February 2 and
2 3, 1988.

3 Appellant appeared by William D. Maer, Attorney at Law.
4 Respondent, State Department of Ecology, appeared by Jay J. Manning,
5 Assistant Attorney General. Reporter Gene Barker & Associates
6 provided court reporting services. Respondent elected a formal
7 hearing pursuant to RCW 43.21B.230.

8 Witnesses were sworn and testified. Exhibits were examined.
9 Closing briefs were filed on March 8, 1988. From testimony heard and
10 exhibits examined, the Pollution Control Hearings Board makes these

11 FINDINGS OF FACT

12 I

13 This matter arises at the Olympia facility of appellant, Cascade
14 Pole Company ("Cascade"). The facility is located on ten acres at the
15 tip of the Port of Olympia Peninsula which juts into Budd Inlet of
16 Puget Sound.

17 II

18 Since its inception in 1939, the purpose of the facility has been
19 to treat wooden poles with preservatives. The treated poles have been
20 sold for use as utility poles, piling and other commercial purposes.
21 Cascade bought the facility in 1957 and operated it until October
22 1986, when the facility was permanently closed. During Cascade's
23 operations poles were pressure treated with creosote and, in
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1 later years, a 5 percent pentachlorophenol (PCP) solution in medium
2 aromatic oil.

3 III

4 This Cascade facility was involved in the prior case of Cascade
5 Pole Co. v. State Department of Ecology, PCHB No. 86-105 (1987). We
6 take official notice in this matter of our Findings, Conclusions and
7 Order recently entered in that prior case. Therein, we found
8 widespread soil contamination caused by escapement of preservatives
9 from Cascade's operations. Cascade's preservative contaminants which
10 have escaped to the soil are leaching continuously to groundwater
11 which is in hydraulic continuity with the marine waters of East Bay of
12 Budd Inlet. Groundwaters beneath the Cascade pressure chamber and
13 tanks are severely contaminated, and the upper groundwater there
14 exhibits the appearance of crude oil. Moreover, the contaminants
15 continuously migrate through the groundwater to emerge in the
16 sediments and waters of East Bay, and pose a direct threat to aquatic
17 life. The situation is one of grave, continuous pollution of ground
18 and surface waters.

19 IV

20 Waste discharge permits issued by the State to Cascade from 1957
21 to 1972 recite that:

22 "Effluent from the oil separator is to be discharged
23 on land to prevent phenols and naphthalene from entering
24 the estuary. Accumulated solids are to be disposed of
in a manner approved by this Commission."

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1 The "effluent from the oil separator" had its origins in the water
2 which escaped from the logs as steam while preservatives were applied
3 in the pressure tanks. This steam, once condensed back to water, was
4 routed from the pressure tanks to other tanks known as gravity
5 separators. Lighter oils contaminating the water would go to the
6 top. Heavier oils would go to the bottom. The layer of water between
7 the two weights of oil would then be drained to land but the oil was
8 retained in tanks for re-use. According to an inspection report
9 conducted by the State in 1962, the effluent "was clear and free from
10 oil".

11 "Accumulated solids" referred to in the permit language above
12 meant sludge such as accumulated in the creosote tanks. Oil and
13 sludge was deposited on the sand fill adjacent to the plant and burned
14 with other debris.

15 Neither the permitted effluent discharge nor the burning of sludge
16 was a substantial factor in the severe contamination of the soil and
17 groundwaters at issue. Substantial spills and leakage of preservative
18 by Cascade onto the ground were the cause of this contamination. Such
19 spills and leakage were neither required nor authorized by State
20 permit.

21 V

22 State water pollution inspections of the Cascade facility from
23 1957-72 focused upon the adjacent surface waters of Budd Inlet and
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1 apparently did not involve groundwaters. In 1972, it was noted that
2 treating materials used by Cascade Pole were emerging from the
3 tideland near the site of a former log storage pond which had been
4 filled some seven years earlier. An interceptor drain was proposed by
5 the State and built by Cascade to form a barrier at the mouth of the
6 former pond. This served to protect surface waters. In 1972 neither
7 the State nor Cascade had actual knowledge of the widespread
8 underground contamination at Cascade's facility.

9 VI

10 In January, 1983, during excavation of a ditch for the sewer line
11 to serve the East Bay Marina, workers discovered an oily substance
12 seeping into the ditch near the Cascade facility. Respondent State
13 Department of Ecology (DOE) was notified.

14 VII

15 The 1983 discovery of underground contamination, precipitated
16 certain requirements by DOE that Cascade conduct underground
17 sampling. By 1984, both DOE and Cascade had performed some
18 inspections of the site but sampling by Cascade had not proceeded as
19 DOE wished. A \$6,000 civil penalty was therefore assessed by DOE
20 against Cascade in 1985. Cascade appealed that penalty to this
21 Board. The matter was settled by agreement of the parties to conduct
22 further sampling.

23 VIII

24 Meanwhile, Cascade had also agreed to submit to DOE a "Remedial
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1 Investigation" work plan for determining the extent of underground
2 contamination. In April 1985, DOE reviewed the work plan and approved
3 it with changes. The Remedial Investigation was to be followed by a
4 "Feasibility Study" of clean-up procedures to be filed with DOE in
5 March, 1986. At the due date, Cascade notified DOE that neither the
6 Remedial Investigation nor the Feasibility Study were complete. Thus,
7 in May 1986, DOE issued a regulatory order to Cascade reiterating
8 formally the necessity of completing the Remedial Investigation and
9 Feasibility Study. While continuing to work on the Remedial
10 Investigation, Cascade appealed the DOE regulatory order to this Board
11 challenging the authority of DOE to promulgate such an order. That
12 appeal was our prior Cascade Pole, PCHB No. 86-105, cited above.

13 IX

14 On Friday, November 21, 1986, two DOE officials assembled
15 laboratory equipment necessary to sample the underground contamination
16 at the site. This equipment had been chemically cleaned and selected
17 over the course of two days to assure the accuracy of sample
18 analysis. The equipment was loaded into a van driven by the two DOE
19 officials who arrived at the facility at 1:05 that Friday afternoon.
20 The facility had been permanently closed for about one month when the
21 DOE officials arrived. Thus, there were no supervisory personnel at
22 the facility. Cascade's workmen remained at the site. The DOE
23 officials asked the workman in charge for access onto the site to
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1 take samples from a well (N-26). That well had been placed earlier by
2 Cascade as a part of an investigation of underground conditions.

3 X

4 The Cascade workman asked the DOE officials to telephone a Cascade
5 supervisor in Tacoma. They did so. The Tacoma supervisor said he
6 would drive down, meet on the site at 3:00 p.m. and he, in fact, did
7 so. Rather than admit the DOE officials, however, he telephoned
8 another supervisor who in turn put the DOE officials in telephone
9 contact with Cascade's legal counsel in Seattle. Cascade's counsel
10 asked the purpose of the sampling and was told that the sampling would
11 be from well N-26 and would be analyzed for acid/base/neutral and oil
12 and grease. Cascade's counsel asked by what authority DOE sought the
13 samples. The DOE officials stated that they were proceeding under any
14 or all of the Water Pollution Control Act, chapter 90.48 RCW, the
15 Hazardous Waste Management Act, chapter 70.105 RCW, and the terms of
16 Cascade's National Pollutant Discharge Elimination System (NPDES)
17 permit. Cascade's counsel then denied permission for the DOE
18 officials to take samples, although granted permission to go onto the
19 site without taking samples. Cascade's counsel expressed concern that
20 the DOE request to sample was not communicated sufficiently in advance
21 to allow Cascade to retain technical representatives with expertise
22 similar to the DOE officials in order to co-sample or split samples
23 simultaneously with DOE.

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1 Cascade's counsel offered to allow sampling with such a technical
2 representative present on the following Monday. The DOE officials
3 declined this invitation and, after touring the site without taking
4 samples, returned to their offices.

5 XI

6 Following the above refusal of access for sampling, DOE sought a
7 court order allowing access for sampling 1) without permission of
8 Cascade and 2) without prior notice to allow participation of Cascade
9 technical co-samplers. The Superior Court for Thurston county granted
10 such an order to take samples at any reasonable time. When the order
11 was entered, on December 4, 1986, DOE officials served the order upon
12 Cascade, entered the facility and took samples of groundwater from the
13 N-26 well in addition to soil samples.

14 XII

15 The samples taken on December 4, 1986, revealed the following:

- 16 1. Well N-26 groundwater: 190,000 parts per billion of
17 pentachlorophenol (PCP).
18 2. Soil sample number 1: 940,000 parts per billion of PCP.
19 3. Soil sample number 6: 510,000 parts per billion of PCP.
20 4. Soil sample number 8: 450,000 parts per billion of PCP.

21 PCP is a preservative used by Cascade in its pole treatment since
22 about 1964. Although DOE has not adopted numerical water quality
23 standards for groundwater, a sense of perspective can be gained from
24 looking at numerical water quality standards for surface waters. For
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1 surface waters such as the Budd Inlet, deteriorious material
2 concentrations shall not adversely affect public health or cause toxic
3 conditions to aquatic biota, WAC 173-201-045(3)(c)(vii). The DOE has
4 quantified these values by adopting numbers developed by the United
5 States Environmental Protection Agency. WAC 173-201-035(12). These
6 numerical limits in the Budd Inlet would be, in parts per billion:

	<u>Public Health</u>	<u>Aquatic Biota</u>
PCP	1,010	53

9 As found in Cascade Pole, PCHB No. 86-105, these PCP groundwater
10 contaminants have migrated to marine waters and have produced PCP
11 readings in marine waters of 8.6 parts per billion while 53 parts per
12 billion are toxic to aquatic life. Moreover, while the groundwater at
13 issue is saline, and unfit for domestic uses, it would have had at
14 least the potential for commercial or industrial uses such as washing
15 or cooling. This is not so in its present state of contamination.

16 XIII

17 Cascade was told by DOE in December 1986, to expect civil penalty
18 assessment based upon its refusal of sampling on November 21, 1986,
19 and the sampling results of December 4, 1986.

20 XIV

21 On January 26, 1987, this Board issued its decision affirming the
22 regulatory order appealed by Cascade in our PCHB No. 86-105, cited
23 previously herein.

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XV

On February 25, 1987, Cascade and DOE entered into a "Consent Order". This includes an agreed schedule for Cascade to file with DOE its Feasibility Study of clean up procedures. Preparation of the Feasibility Study has proceeded in accordance with this Consent Order. Since 1983 to December, 1987, Cascade has spent in excess of \$460,000 in studies of contamination of its Olympia facility.

XVI

On March 2, 1987, DOE assessed civil penalties totaling \$30,000 against Cascade as follows:

1. \$15,000 for refusal of access to sample on November 21, 1986, for alleged violation of A) RCW 90.48.090, B) the NPDES permit granted to Cascade under RCW 90.48.180, and C) RCW 70.105.130(2)(d).
2. \$15,000 for 1) discharge of material causing pollution of waters of the state under RCW 90.48.080 and 2) spilling or improperly disposing of designated hazardous waste under WAC 173-303-145(3).

Penalties for the above alleged violations are provided at RCW 90.48.144 and RCW 70.105.080.

XVII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

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1 CONCLUSIONS OF LAW

2 I

3 Respondent DOE, bears the burden of proof in a civil penalty case
4 such as this one. See Yakima County Clean Air Authority v. Glascam
5 Builders, Inc., 85 Wn.2d 255, 260, 534 P.2d 33, 36 (1975) likening the
6 effect of a notice of penalty to the service of a summons in a civil
7 action.

8 II

9 This matter concerns allegations involving the refusal of access
10 for sampling on November 21, 1986, and substantive contamination
11 allegations arising from the sampling done on December 4, 1986. We
12 will first take up the substantive, then the access, allegations.

13 III

14 Substantive Contamination. The State Water Pollution Control Act
15 provides at RCW 90.48.080:

16 It shall be unlawful for any person to throw, drain,
17 run, or otherwise discharge into any of the waters of
18 this state, or to cause, permit or suffer to be thrown,
19 run, drained, allowed to seep or otherwise discharged
20 into such waters any organic or inorganic matter that
shall cause or tend to cause pollution of such waters
according to the determination of the commission, as
provided for in this chapter.

21 The term pollution is defined within the chapter as
22 follows:

23 Whenever the word "pollution" is used in this chapter,
24 it shall be construed to mean such contamination, or
25 other alteration of the physical, chemical or biological
properties, of any waters of the state, including change
in temperature, taste, color, turbidity, or odor of the

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1 waters, or such discharge of any liquid, gaseous, solid,
2 radioactive, or other substance into any waters of the
3 state as will or is likely to create a nuisance or
4 render such waters harmful, detrimental or injurious to
5 the public health, safety or welfare, or to domestic,
6 commercial, industrial, agricultural, recreational, or
7 other legitimate beneficial uses, or to livestock, wild
8 animals, birds, fish or other aquatic life.
9 RCW 90.48.020.

10
11 IV

12 We conclude that appellant, on December 4, 1986, permitted or
13 suffered the discharge of matter into waters of the state so as to
14 cause or tend to cause pollution of such waters in violation of RCW
15 90.48.080.

16 V

17 As found in the prior case of Cascade Pole Company v. State
18 Department of Ecology, PCHB No. 86-105 (1987) there is a continuing
19 discharge of contaminants from soil on the Cascade site to waters of
20 the state. The evidence in this matter shows that the continuing
21 discharge of contaminants persisted to the day in question here,
22 December 4, 1986.

23 VI

24 Cascade urges that the widespread underground contamination on its
25 site originated with historical practices which were lawful under then
26 applicable state permits. We disagree. As we have found (see Finding
27 of Fact IV, above) neither the effluent discharge nor the burning of
sludge was a substantive factor in the severe contamination of the

1 soil and groundwater at issue. That contamination resulted from
2 regular leakage and spills of preservative by Cascade. Such spills
3 and leakage were not condoned by State permit.

4 Moreover, while the inspections of the facility by the State were
5 apparently not directed to below-ground conditions, the belated
6 discovery of the contamination there does nothing to excuse it or
7 render it lawful.

8 VII

9 The State Hazardous Waste Management Act, chapter 70.105 RCW, is
10 implemented by the following regulation cited by respondent in the
11 civil penalty notice:

12 WAC 173-303-145 Spills and discharges into the
13 environment. (1) Purpose and applicability. This
14 section sets forth the requirements for any person
15 responsible for a spill or discharge into the
16 environment, except when such release is otherwise
17 permitted under state or federal law. For the purposes
18 of complying with this section, a transporter who spills
19 or discharges dangerous waste or hazardous substances
20 during transportation will be considered the responsible
21 person. This section shall apply when any dangerous
22 waste or hazardous substance is intentionally or
23 accidentally spilled or discharged into the environment
24 (unless otherwise permitted) such that public health or
25 the environment are threatened, regardless of the
26 quantity of dangerous waste or hazardous substance.

27 (2)

(3) Mitigation and control. The person responsible
for a nonpermitted spill or discharge shall take
appropriate immediate action to protect human health and
the environment (e.g., diking to prevent contamination
of state waters, shutting of open valves).

1 The above regulation was adopted in 1982. It is applicable to
2 "dangerous waste" or "hazardous waste" discharged "into the
3 environment" according to the second underscored language in
4 subsection (1), above. Because of this, it is necessary to show that
5 the proscribed waste entered the "environment" since adoption of the
6 rule in 1982 in order to sustain its violation. Respondent has not
7 shown that on this record.

8 A discharge to the environment would occur with any spill or
9 leakage of preservative to the soil. The latest evidence in this
10 record of a spill or leakage event was in 1971. The regulation is
11 violated only by a spill or leakage after the advent of the regulation
12 in 1982.¹ Respondent has not proven a violation of WAC
13 173-303-145(3) alleged in the notice of penalty. The same is true of
14 WAC 173-303-141 advanced in testimony at hearing.

15 VIII

16 Refusal of Access for Sampling. The State Water Pollution Control
17 Act provides at RCW 90.48.090:

18 The department [of Ecology] or its duly appointed
19 agent shall have the right to enter at all reasonable
20 times in or upon any property, public or private, for
21 the purpose of inspecting and investigating conditions
22 relating to the pollution of or the possible pollution
23 of any waters of this state. [Brackets added.]

24 ¹ This is in contrast to the showing made by respondent under the
25 Water Pollution Control Act, chapter 90.48 RCW, where the gravamen is
26 "discharge to waters of the state". RCW 90.48.080. Ample evidence
27 was presented that contaminants are presently discharging from the
soil to groundwater.

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1 On November 2, 1986, DOE sought entry to Cascade's facility at a
2 reasonable time. It was within the normal working hours of a
3 weekday. Moreover, the closure of the facility enhanced, rather than
4 diminished the reasonableness of the visit precisely because the
5 closure had left the site with no supervisory personnel. By the time
6 in question, water pollution was more than a mere possibility to both
7 Cascade and DOE. Appellant's position seems to add to the statutory
8 right of entry a requirement of prior notice sufficient to allow
9 consultants to be retained by the property owner to simultaneously
10 co-investigate conditions. Yet that requirement is not in the
11 statute. Likewise there is nothing to suggest that sampling soil or
12 water is not within the ordinary meaning of the terms "inspecting and
13 investigating" used in the statute. Appellant violated RCW 90.48.090
14 on November 21, 1986, by refusing access to DOE for groundwater
15 sampling.

16 IX

17 The NPDES permit issued to Cascade provides at general condition 7
18 on page 7:

19 The permittee shall, at all reasonable times, allow
20 authorized representatives of the Department:

- 21 a. To enter upon the permittee's premises for the
22 purpose of inspecting and investigating conditions
23 relating to the pollution of, or possible
24 pollution of, any of the waters of the state, or
25 for the purpose of investigating compliance with
26 any of the terms of this permit.

- 1 b. To have access to and copy any records required to
2 be kept under the terms and conditions of this
3 permit.
4 c. To inspect any monitoring equipment or monitoring
5 method required by this permit; or
6 d. To sample any discharge of pollutants.
7 (Emphasis added.)

8 Although appellant's position seems to be that this provision is
9 limited to the discharge regulated by the permit, the plain meaning of
10 the words underscored above make this provision applicable to any
11 discharge to any waters of the state. Appellant violated its NPDES
12 permit on November 21, 1986, by refusing access to DOE for groundwater
13 sampling.

14 X

15 The State Hazardous Waste Management Act provides at
16 RCW 70.105.130(2)(d):

17 The power granted to the department by this section
18 is the authority to:

19 (d) Enter at reasonable times establishments
20 regulated under this section for the purpose of
21 inspection, monitoring and sampling . . .
22 (Emphasis added.)

23 Respondent has proven a violation of RCW 70.105.130(2)(d) alleged in
24 the notice of appeal.

25 XI

26 Penalty Assessment. Where, as here on December 4, 1986, an individual
27 civil penalty is assessed upon the basis that there has been one

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1 violation in each of two separate statutes and there is no manifest
2 intent to the contrary by respondent, we will presume that one half of
3 the undivided penalty rests upon each statute. Having concluded that
4 the alleged violations on December 4, 1986, under chapter 70.105 were
5 not proven, we therefore reverse one half of the \$15,000 civil penalty
6 (\$7,500) for the events of December 4, 1986. We proceed now to
7 consider the remaining \$7,500 assessment for December 4, 1986, and the
8 \$15,000 assessment for November 21, 1986.

9 XII

10 The State Water Pollution Control Act provides for maximum
11 penalties of \$10,000 per day for each violation. RCW 90.48.144. The
12 State Hazardous Waste Management Act provides for maximum penalties of
13 \$10,000 per day for each violation. RCW 70.105.080. The assessed
14 penalties are within the maximum afforded by those statutes.

15 XIII

16 The amount of penalty is to be set with regard to, " . . . the
17 previous history of the violator and severity of the violation's
18 impact on public health and/or the environment in addition to other
19 relevant factors." RCW 90.48.144. We have deemed the actions taken
20 by the violator to solve the problem as an additional relevant
21 factor. A & M By-Products v. State Department of Ecology, PCHB No.
22 85-96 (1985) and City of Centralia v. State Department of Ecology,
23 PCHB No. 84-287 (1985).

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XIV

Amount of Penalty - Substantive Violation. Applying the penalty guidelines just set forth to the violation of RCW 90.48.080 relating to water pollution, on December 4, 1986, we conclude: 1) the previous history of the violator shows a protracted period of environmental abuse at this facility and 2) the impact of the violation on the environment is especially adverse because it contaminates from an embedded depth which makes it difficult to halt the contamination. We do not argue, however, that Cascade has been slow in taking action to solve the problem, given the magnitude of the problem. Neither do we deem the appeal taken by Cascade of the regulatory order to have been taken for the purpose of delay.

Despite actions taken to solve the problem, however, the very nature of the violation and the prior history of the violator fully justify the \$7,500 civil penalty assessed, which should therefore be affirmed.

XV

Amount of Penalty - Denial of Access for Sampling. The denial of access for sampling was the first such incident shown on this record. Next, it was not shown that the purpose of the denial was to conceal evidence. Rather, the apparent purpose was to allow participation by appellant in the sampling. Conditions in the well were not shown to have changed materially between the time sampling access was refused and some two weeks later when sampling was taken. The penalty should

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1 therefore be mitigated. However, the wrongful refusal resulted in
2 lost time for DOE, diverting its attention from other matters.
3 Likewise, a wrongful precedent was set by the refusal which, if
4 repeated elsewhere, could substantially impair the ability of DOE to
5 carry out its lawful responsibilities. See GATX Terminals Corporation
6 v. DOE, PCHB No. 87-69 (1988). In view of all the factors pertinent
7 to the refusal, the penalty should be mitigated to \$2,500 and affirmed.

8 XVI

9 Any Finding of Fact deemed to be a Conclusion of Law is hereby
10 adopted as such. From these Conclusions of Law the Board makes this
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ORDER

The violations of the Water Pollution Control Act, Chapt. 90.48 RCW, on December 4, 1986 are affirmed. The \$7,500 penalty based on violation of RCW 90.48.080 is affirmed. The civil penalty under the authorities cited on November 21, 1986, for denial of access for sampling, is mitigated to \$2,500 and affirmed. The foregoing when added together therefore total \$10,000 in penalties affirmed.

DONE at Lacey, WA, this 29th day of June, 1988.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Chairman

Lawrence V. Paulk 6/29/88
LAWRENCE V. PAULK, Member

Judith A. Bendor
JUDITH A. BENDOR, Member

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

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